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IN THE

Supreme Court of the United States

October Term, 1960

No. 457

VAN M. GRIFFITH,

Appellant,

vs.

PEOPLE OF THE STATE OF CALIFORNIA, acting by and through the Department of Public Works,

Appellee,

CITY OF LOS ANGELES, a municipal corporation, *et al.*,

Appellees.

IN OPPOSITION TO MOTIONS TO DISMISS.

Appellant, Van M. Griffith, hereby opposes the motions of appellees to dismiss his appeal and makes reply thereto as follows:

I.

The Judgment Appealed From Does Not Rest Upon Any Adequate Non-Federal Basis.

Appellee's motions to dismiss fail to point out any non-federal ground upon which the decision of the California District Court of Appeal may rest. The fact is that the issues involved in this eminent domain proceeding are necessarily:

1. Whether appellant reversioner may be wholly denied compensation for the taking of the park lands which reverted to him (Point V, below);

2. Whether he has been accorded due process of law for the determination of his rights (Point VI, below);

3. Whether the state statutes passed subsequent to City appellee's acceptance of the deed of gift under the provisions of the City charter constitute impairment of the contract (Point VII, below).

> "The supreme court may not be excluded from assuming jurisdiction on the mere suggestion or conjecture that the state court rested its decision on non-federal grounds."

13 Cyc. Fed. Proc. 290, Sec. 57.189, citing

St. Louis, I. M. & S. R. Co. v. McWhirter, 229 U. S. 290, which held that

> "Mere conjecture may not be indulged in for the purpose of concluding that because there was a potentiality of considering the case from a non-federal point of view, therefore it was considered and decided in that aspect." (l. c. 276). See also Titus v. Wallick, 306 U. S. 282, 290f;
>
> *Dixon v. Duffy*, 344 U. S. 143;
>
> 36 C. J. S. 152, section 244, note 2.

> "Where federal ground is so interwoven with other as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other, the court has jurisdiction."
>
> 36 C. J. S. 152, Federal Courts, Sec. 244, note 4;
>
> *State Tax Commission of Utah v. Van Cott*, 306 U. S. 511, 512f.

None of appellees' cases relating to non-federal grounds are applicable to the facts here. The Stembridge, Buck,

and Zorach cases (cited on page 8 of City appellee's motion) expressly hold that the decisions of the state courts in each of those cases rested on non-federal grounds. The Hammerstein case (there cited) was continued to enable petitioner appellant to apply to the California courts for certificate or other expression to show whether judgment involved any federal question.

We will show in the next point that the federal questions raised by appellant do not rest upon "false assumptions" of fact, as asserted by appellees, but that appellees statements of fact to the contrary are incorrect.

II.

The Federal Questions Raised by Appellant Do Not Rest Upon "False Assumptions" of Fact.

The only issues of fact disputed by appellees relate (1) to the 1897 and 1898 deeds of the park lands to the City of Los Angeles as affecting the question of reversion and right of appellant to compensation, (2) as to time of filing answers and motion for leave to file cross-complaint as affecting due process, and (3) as to evidence of value of lands taken as affecting due process. Appellees fail to point out specifically any "false assumptions" of fact upon which rest the federal questions raised by appellant (See Statement of Facts by City appellee, pp. 2-5, and by State appellee, pp. 2-4). Both appellees refer merely to the indefinite statements of fact in the opinion of the District Court of Appeal and do not cite any of the record of the trial court upon which appellant rests as to the federal questions raised by him (See Jurisdictional Statement, pp. 7-9). We now point out errors of fact in appellees' arguments.

1. As to the Relation Between the 1897 and 1898 Deeds.

Appellant contends that the 1897 deed was merged in the 1898 deed and that the latter consummated the gift of the park to the City and contains the binding and conclusive provisions and conditions of the gift (See Point V below).

It is not true that the 1897 deed conveyed 3000 acres of the park land. There was no such finding of fact by the trial court [See Finding of Fact No. VIII, Clk. Tr. pp. 102-5]. And the evidence introduced by defendant City appellee shows that less than a tenth of the 3000 acres was conveyed by the 1897 deed, and that the whole of the tract of 3015.788 acres (including all land in the 1897 deed) was conveyed by the 1898 deed and then finally accepted and dedicated as Griffith Park by the City of Los Angeles. The boundaries of the land conveyed by the 1897 deed are shown in Exhibit C as outlined in orange color and wholly enclosed within the boundaries of the land conveyed by the 1898 deed as marked by No. 2 and outlined in brown color on said Exhibit C, which is the map introduced in evidence by defendant City appellee. This is also shown by the oral evidence introduced by appellees at the trial.

It is also shown on the map Exhibit A introduced in evidence by defendant City appellee that the land taken which is claimed by appellant by right of reversion is a portion of the land conveyed by said 1898 deed. According to testimony introduced by plaintiff, appellee the land taken included 102.305 acres conveyed by said 1898 deed [Rep. Tr. p. 79]. The portion taken of the 1897 deed (also included in the 1898 deed), as shown on map Exhibit A, was only 45.907 acres.

The facts appertaining to the merger of all instruments of the park gift in the 1898 deed are the following: Offer of the gift was made by letter dated December 16, 1896 [C. T. p. 28, lines 18-23; pp. 38-39; Ex. D; R. T. p. 157, lines 21-26; p. 158, lines 1-11]. Said offer was accepted on the same day by city ordinance No. 3975 (New Series) with directions to the City Engineer to survey and establish the boundaries of the Land and to the City Attorney then to prepare the necessary conveyance [C. T. p. 28, lines 25-30, pp. 40-41; Ex. E; R. T. p. 158, lines 12-16]. A partial conveyance of a small portion of the 3000 acres was made by said 1897 deed. All of said land offered was conveyed by deed executed and delivered on March 5, 1898 [C. T. p. 28, line 32, to p. 29, line 6; pp. 42-47; Ex. G; R. T. p. 159, line 16, to p. 160, line 5], and on the same date was accepted by ordinance No. 4926 and recorded by the City [Ex. H; R. T. p. 160, lines 6-12]. It was not until said 1898 conveyance and ordinance that the transaction of gift was completed in accordance with the terms of said letter of offer Exhibit D.

As held in *Sisk v. Caswell*, 14 Cal. App. 377, 387:

> "All the prior agreements and negotiations of the parties . . . of the lands here involved were, of course, merged in the deed of conveyance, and the deed itself must . . . be the sole guide for measuring and determining the rights of the parties thereunder."

See also *Store Properties v. Neal*, 72 Cal. App. 2d 112, and *Wing v. Forest Lawn Cemetery Assn.*, 15 Cal. 2d 472, 479.

The difference in the acreage as stated in the letter of offer Exhibit D (3000 acres) and that conveyed by the 1898 deed Exhibit G (3015.788 acres) is such a material difference as in this taking of approximately 200 acres would amount to several hundred thousand dollars of damages. Besides, less than half the land here involved was conveyed in the 1897 deed (45.907 acres), while that taken of the land conveyed by the 1898 deed is 102.305 acres [R. T. p. 79]. Therefore, the provisions of the 1898 deed which conveyed only a determinable fee to the City entitle appellant reversioner to compensation for his land taken in this condemnation proceeding (see Point V below).

2. Denial of Leave to File Cross-Complaint Was Denial to Appellant of Due Process of Law.

State appellee contends "that appellant-defendant could have raised all of his alleged rights by answer to the complaint in eminent domain so that no cross-complaint is necessary to protect any rights of a property owner" (p. 3 of Motion, par. 5). Appellee's contention is in conflict with the holding of the ruling case it cites as authority on page 8 of its Motion, *People v. Buellton Development Co.*, 58 Cal. App. 2d 178. Quoting from the opinion of that case:

> "The provision for an answer in eminent domain requires the defendant to set forth therein his estate or interest in the property to be condemned, but it makes no provision for service thereof upon another defendant who may have a conflicting claim, or for the framing of issues upon such conflict-

ing claim. No doubt a statute could raise such issues without pleadings, and it would probably be within constitutional limits if it required that a defendant, after service of process to bring him into the action, be charged with notice of adverse claims upon him, in regard to the subject matter of the action, by the pleadings of any of the parties thereto. But this would be an uncertain and inconvenient procedure for framing and trying such issues, and we see no reason for placing such a construction upon a statute if another more reasonable one is permitted by its language.

"Plaintiff objects that the cross-complaint covered other land than that to be condemned, as described in the complaint, and raised issues as to the title of such other land. But it is well established that in an action involving land as its subject matter, a cross-complaint affecting that land and also other land may properly be filed, where the cause of action set up therein affects such other land and that described in the complaint as a unit, or in such manner that one cannot be separated from the other without prejudice to the party filing the cross-complaint. . . . The cross-complaint here comes well within this rule. . . . The order striking appellants' cross-complaint is reversed."

The Buellton case is on this point conclusive that only by cross-complaint could appellant-defendant contest with City-defendant their conflicting claims relative to the reversion of Griffith Park and his right to compensation for the portion taken.

State appellee also contends that it was proper to deny relief by cross-complaint because of the lateness of the attempted filing thereof and because it was not filed at the time of filing the original answer (Motion, pp. 7-9). But this contention disregards the facts that, subsequent to the filing of the original complaint praying for an injunction, plaintiff-appellee took possession of the portion of Griffith Park described in the complaint and constructed the state highway thereon [C. T. p. 102, lines 5-6, and R. T. pp. 388-391; Ex. P]; that City appellee did not file its answer until December 7, 1957, in which it opposed the taking on grounds similar to those in this defendant-appellant's answer [C. T. pp. 68-69]; but that one year later City defendant-appellant abandoned those defenses and consented and acquiesced in said taking by Resolution of its Board of Recreation and Park Commissioners No. 2859 (adopted December 11, 1958 [R. T. p. 422] and by City Ordinance No. 107485, adopted January 8, 1959 [R. T. p. 433]. Very soon thereafter on January 19, 1959, defendant-appellant filed motion for eave to file his proposed cross-complaint [C. T. pp. 153-164], which motion was denied [C. T. p. 165]. Defendant-appellant's motion for leave to file said cross-complaint was obviously timely, and it was an abuse of discretion to deny his said motion, and thereby he was deprived of due process of law (See also Point VI below).

Inasmuch as a clear abuse of discretion appears here, the cited case of *Glogau v. Hagan*, 107 Cal. App. 2d

313, 320, is not in point here, as to untimeliness of filing cross-complaint, but that case does recognize the principle that abuse of discretion is ground to defeat the trial court's adverse ruling.

3. Exclusion of Evidence of Value of Lands Taken Denied Appellant Due Process of Law.

It is not true that appellant offered no evidence as to the value of his interest. All evidence as to value was excluded on the ground that defendant-appellant had no title to the land and was therefore not concerned as to the value of the land (R. T. pp. 424-430; p. 382, lines 7-12; p. 409, lines 17-26; p. 413, lines 2-23; p. 11, lines 19-22; p. 329, lines 16-22; pp. 410-421).

For the 200 acres of park land taken the City settled for $3,750,000.00 by stipulation and agreement with the State, and no evidence was taken as to the actual value of the land. Presumably on that basis defendant-appellant's interest was worth more than one million dollars.

However, in this appeal the issue is not as to the value of his interest but as to whether he had his day in court and due process as guaranteed by the Constitution of the United States.

III.

A Substantial Federal Question Is Presented by This Appeal.

City appellee admits that "At page 9 of his Statement of Jurisdiction appellant refers to the first point at which we can agree that he raises a federal question", and then makes a condensed statement of the three grounds for federal jurisdiction of this case as urged by appellant (p. 11 of City Appellee's Motion to Dismiss).

As to whether paragraphs 1, 2, 3, and 4 are relevant as showing that appellant raised federal questions prior to assignments of error in his Opening Brief, we think the following authorites are pertinent:

> "Where a federal question has actually been considered and decided by the state court of last resort, the time at which the method by which such question was presented is immaterial as bearing on the right to a review in the United States Supreme court."
>
> 36 C. J. S. 177, Federal Courts, Sec. 274, note 36, citing:
>
> *Herndon v. Lowry*, 301 U. S. 42, 247;
>
> *Charleston Fed. S. & L. Assn. v. Alderson*, 182 U. S. 182, 185f.

> "A federal question is substantial which requires analysis and exposition for its decision, even though on the merits it may be decided against appellant:"
>
> *Milheim v. Moffat Tunnel Imp. Dist.*, 262 U. S. 710, 716f;
>
> *Louisville & N. R. Co. v. Melton*, 218 U. S. 34, 49;

36 C. J. S. 150, Federal Courts, Sec. 243, note 94;

13 Cyc. Fed. Proc. 248, Sec. 57.157, note 1.

Appellees have failed to show that there is no substantial federal question or that a federal question has not been sufficiently raised.

IV.

The State Court's Decision Necessarily Involves the Three Federal Questions Raised, and It Actually Passed Upon Them.

"Whether a state court decided a federal question is, in itself, a federal question, which the supreme court determines from an examination of the record."

36 C. J. S. 152, Federal Courts, Sec. 244, note 99;

Lovell v. City of Griffin, 303 U. S. 444, 450, and cases cited;

Honeyman v. Hanan, 300 U. S. 14, 18.

"In cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of lower courts, but will examine the evidentiary basis on which those conclusions are founded."

Niemotko v. State of Maryland, 340 U. S. 268, 271;

Feiner v. New York, 340 U. S. 315, 316.

"A state court cannot, by resting its judgment on some ground of local or general law, defeat the appellate jurisdiction of the Supreme Court of the

United States, in a case where the federal question was so involved that its determination was necessary to the disposition of the issue."

36 C. J. S. 152, Federal Courts, Sec. 244, note 27;

Titus v. Wallack, 306 U. S. 382, 290, 292;

Ward v. Love Co., 253 U. S. 17, 22f;

13 Cyc. Proc. 293, Sec. 57.191, note 91, citing:

West Chicago St. R. Co. v. Illinois ex rel., 201 U. S. 506, 519f;

Chicago, B. & Q. Ry. Co. v. Illinois, 200 U. S. 561, 579-80.

"The supreme court will review a federal question, although it was not put in question by the pleadings or directly passed on in the opinion, where it is apparent both from the pleadings and the record that the decision of the state court could not have been reached except by disposing of such question."

36 C. J. S. 152-3, Federal Courts, Sec. 244, note 5;

Toledo, St. L. & W. R. Co., 236 U. S. 454, 457;

International Harvester Co. v. Missouri, 234 U. S. 199, 207.

In a condemnation suit it is unescapable that the taking of land without compensation of a reversioner's interest is prohibited by the United States Constitution, and is under the aforesaid authorities a federal question, notwithstanding silence of the state court's decision after the question had been raised. The denial of

right to compensation also constitutes denial of due process of law. Here too the pleadings stated facts showing the impairment of the contract of gift by the subsequent legislation which was held valid in the lower courts. These federal questions are therefore necessarily involved in the decision appealed from.

Under the next three points appellant will show that, in conformity with the rules stated in the authorities cited by appellees (p. 11 of City Appellee's Motion), appellant has unmistakably declared in the state courts that he invoked, for the protection of his rights the provisions of the 14th Amendment and section 10 of Article 1 of the United States Constitution.

V.

Appellant Sufficiently Raised the Federal Question of His Right to Compensation as Reversioner of the Park Land Taken.

1.

In his original answer appellant alleged his reversionary right [C. T. p. 29, pars. IV and V], the illegality of the attempt to take the park land [C. T. p. 32, pars. VIII, IX, and XI], and prayed for an injunction against the taking [C. T. p. 37].

In the proposed cross-complaint which he moved the court for leave to file, for a first cause of action he alleged ownership of the lands conveyed to the City by said 1898 deed and sought to quiet title thereto against the City and State appellees herein [C. T. pp. 154-5, pars. I, II, and III]. For a second cause of action he alleged that plaintiff-appellee had taken a portion of said park land [103.305 acres; C. T. p. 155, par. II]

and had completed construction of said freeway thereon [C. T. p. 156, par. V], that said taking is in violation of the law and the City Charter (par. VI), is not for a more necessary public use (par. VII), that the act of the California Department of Public Works in said taking was an abuse of discretion, arbitrary, capricious, (par. VIII), ultra vires and without legal right and in violation of the 14th Amendment of the Constitution of the United States [C. T. pp. 156-7, par. IX]. Said proposed cross-complaint also alleged the conspiracy of said City in said illegal taking by not defending against said taking [par. XII, C. T. p. 158] and by permitting and agreeing to said taking by ratification and approval by the City Council on January 8, 1959, of settlement for damages in the sum of $3,750,000.00 [C. T. p. 159, par. XIII]. Said cross-complaint further alleged that defendant Griffith as owner of the determinable fee [C. T. p. 159, pars. XIV and XV] was damaged by the said taking [C. T. pp. 162-3, par. XVII] and prayed for quieting of title and for damages for the taking of the lands for the freeway [C. T. p. 163].

At the Pre-trial Conference defendant-appellant again claimed right to cross-complain and that the denial of his motion for leave to file cross-complaint denied him his day in court to assert his claim for damages as reversioner of the determinable fee of said park lands [C. T. pp. 180-1], and at the trial he continued to demand his right to cross-complaint [R. T. pp. 28-38, which was denied him [R. T. p. 145].

Defendant Griffith gave due Notice of Appeal from the Order denying his right to cross-complaint [C. T. p. 176].

City appellee admits that this federal question was duly raised in appellant's Opening Brief in the District Court of Appeal (City appellee's Motion to Dismiss, p. 11). (See Jurisdictional Statement, p. 9, par. 5(a).)

2. Appellant Is Denied His Property Right of Reversion.

The state court's erroneous construction of the 1898 deed deprives appellant of his right as reversioner of the determinable fee to compensation as required by the 14th Amendment of the United States Constitution for the taking in eminent domain of said park lands.

The decision of the California District Court of Appeal is on this point in conflict with California law as heretofore established and with the general law. The court erroneously construes the reversionary clause as a condition subsequent and holds that the title has not reverted to him because of the taking and he is not entitled to compensation (Appendix Opinion, pp. 13-16).

The provision of the 1898 deed that "*whenever* said tract of land hereby conveyed, or *any part* thereof *shall cease to be used as a park; . . . then the lands* hereby conveyed *shall immediately . . . revert,*" is, as the precedents and authorities uniformly hold, the apt expression of a determinable fee.

In 18 Cal. Jur. 2d 395, Estates, Sec. 1, the distinction between a determinable fee and a condition subsequent is defined with recitation of phrases construed in California cases, as follows:

> "Phrases such as 'in case . . . then,' 'should . . . then', 'in the event . . . then', 'while', 'so long thereafter as' indicate a determinable interest. On

> the other hand, prases such as 'if', 'on condition', 'failure . . . shall give . . . the right' import estates on condition."

The appellate court's opinion (Appendix p. 13) cites the irrelevant Sec. 45, p. 140, of Restatement of Law, Property. The California Annotations of that authority state that the California law is "in accord" with it (pp. 31 and 35). As it states the difference between a determinable estate and a condition subsequent is that a fee simple determinable estate "automatically expires upon the occurrence of an event" (Rest. Prop., Sec. 44(b), p. 121), while a fee simple upon condition subsequent requires a re-entry to terminate the estate (Rest. Prop. Sec. 45, p. 133ff). In said Sec. 44 (comment 1, pp. 128-9) is listed "words appropriate to express automatic expirations", which are similar to those above quoted from 18 Cal. Jur. 2d 395, as indicating a determinable estate as distinguished from a condition subsequent. Paragraph V of said comment 1 (p. 129) is substantially the exact clause contained in the 1898 deed, to-wit:

> V. "to B and C (trustees of a school district) and their heirs and successors for school purposes and to revert to the grantor when it ceases to be so used".

But, even if a condition subsequent, appellant is entitled to compensation under the facts of this case. For, as held in *Firth v. Los Angeles Pacific Land Co.*, 28 Cal. App. 399, under the provisions of section 1109 of the California Civil Code, a formal re-entry upon the land in the case of a condition subsequent is not necessary, and "determination of the grantor to take ad-

vantage of the condition broken . . . would also be well manifested by the bringing of an action to have declared the estate of the grantee terminated." Therefore, appellant's Supplemental Answer [C. T. pp. 93-96] constitutes the demand provided for in said section 1109 of the Civil Code. Furthermore, City, appellee was put on notice of the nature of appellant's demand by his answer [C. T. pp. 24-60] and especially by appellant's motion for leave to file cross-complaint [C. T. pp. 153-164], which latter was served on City appellee on January 19, 1959, and which asserted appellant's fee title by reversion [par. XIV, C. T. p. 159].

As we have shown above, (Point II, par. 1), the provisions for reversion in the 1898 deed (which merges the 1897 deed) are controlling.

The appellate court's opinion (Appendix pp. 18-21) disregards the essential point that the reversion occurred before the plaintiff-appellee acquired title by eminent domain and therefore the reversioner was entitled to compensation. As held in *People v. Peninsula Title Guaranty Co.*, 47 Cal. 2d 29, title does not pass to the condemnor until entry of the final judgment and payment of compensation. See also:

Calif. Code Civ. Proc., Sec. 1253;

City of Long Beach v. Aistrup, 164 Cal. App. 2d 1;

Las Altos School District v. Watson, 133 Cal. App. 2d 447;

Russakov v. McCarthy Co., 206 Cal. 682.

The facts of this case distinguish it from the cases cited in state appellee's brief (pp. 6-7). Here the tak-

ing in eminent domain became effective upon taking of possession and the construction of the freeway was complete before trial, and the acts of City appellee in assisting and consenting to said condemnation constituted an abandonment by the City of that portion of the park taken for the freeway, and all this occurred before the trial and before plaintiff appellee acquired title by final judgment and payment of compensation. These differing facts place this case in the class of those cases which have awarded compensation to a reversioner upon the taking in eminent domain, namely:

Romero v. Department of Public Works, 17 Cal. 2d 189, which is distinguished in *Santa Monica v. Jones*, 104 Cal. App. 2d 463;

United States v. 2,184.81 Acres of Land, 44 Fed. Supp. 681;

Harris v. Elliott, 10 Pet. (U. S.) 25, 55 *et seq.*;

In re Opening and Extending of North Conduit Avenue, 262 App. Div. 70, 27 N. Y. S. 2d 841, which distinguishes *First Reformed Dutch Church v. Crosswell*, 206 N. Y. S. 132 (cited by state appellee, pp. 6-7);

Porter v. International Bridge Co., 206 N. Y. 234;

James v. Gulf Refining Co., 206 Miss. 781;

Lancaster School District v. Lancaster County, 265 Pa. 112.

Appellees contend that the clause in the 1898 deed making an exception "for the use of any part of said

premises for transportation purposes, for carrying inhabitants of the City into and through said park" as authority and permission to take approximately 200 acres of the park for state freeway purposes, and the appellate court says this "use appears to be one excepted under the deed." But, as said by the Court in *Griffith v. Department of Public Works*, 141 Cal. App. 2d 376:

> "It is difficult to believe that the Griffith donors ever intended that this provision should be interpreted as furnishing authority for construction of a public, high-speed freeway which would remove 206 acres of land from the original park purpose."

Only appellant offered testimony on this issue. Appellant (the donors' son) testified about the efforts of his father to maintain bus lines and street railway service to and from the park [R. T. p. 344, lines 12-21]. Mrs. Harold Morton, president of the Board of Recreation and Park Commissioners testified that said Board strenuously opposed the taking of the park lands for the state freeway project [R. T. pp. 232-235; and Exs. G-A, G-B, G-C, G-D, G-E, G-F, G-H, G-I, G-J, and G-L], that the construction destroyed park facilities in the area taken for the freeway [R. T. pp. 268-281], that the Board had to purchase other land to replace that taken [R. T. p. 329, lines 16-22], and that Riverside Drive taken and appropriated for the freeway had provided adequate roadway facilities for access to the park [Ex. G-B; R. T. p. 232, lines 9-16].

California cases have uniformly held that use of park land for a street is not a use for park purposes:

Olmstead v. City of San Diego, 124 Cal. App. 14;

Hall v. Fairchild, 66 Cal. App. 615, 621 *et seq.;*

Mulvey v. Wangemheim, 23 Cal. App. 268, 272;

Griffith v. Department of Public Works, 141 Cal. App. 2d 376.

"The terms of such a grant should be strictly construed."

Griffith v. Department of Public Works, supra.

"It is well settled that where a grant deed is for a specified, limited and definite purpose, the subject of the grant cannot be used for another and different purpose."

Roberts v. City of Palos Verdes Estates, 93 Cal. App. 2d 545, 547.

It is obvious that the donors meant by this transportation clause to provide for transportation into and through the park to make it accessible to the City's inhabitants, and not that land should be taken from the park and diverted to other and inconsistent uses such as that for the Golden State Freeway.

It is certainly straining and stretching the terms of the grant and dedication of Griffith Park to read into them the intent that said park land by virtue of said transportation clause was meant to provide for the wholly inconsistent and different use of a major state highway and freeway.

VI.

This Taking Is in Violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

Appellee City admits that appellant duly raises the federal question that "The taking of Griffith Park lands for state freeway purposes violates the due process clause of the 14th Amendment to the United States Constitution." (P. 11 of its brief and Motion).

Appellant's Statement of Jurisdiction sets four grounds upon which he claims he has been denied due process of law, to-wit:

(a) "by denial of leave to file cross-complaint (see subdivision 2 of Point II above) which was passed upon by the District Court of Appeal (Appendix opinion, pp. 8-9). By denial of leave to file cross-complaint appellant was denied right to contest title with City appellee."

(b) by the arbitrary and ultra vires action of the California Highway Commission and the Department of Public Works, appellant was denied due process of law. This ground was pleaded in defendant appellant's original answer [par. VIII, C. T. p. 31; par. X, C. T. p. 33; par. XI, C. T. p. 34; par. XIII, C. T. p. 37]. This ground was also pleaded in the cross-complaint he was not given leave to file [par. VIII, C. T. p. 156; par. IX, C. T. pp. 156-7]. Appellant assigned as error the exclusion of evidence thereof (Point XVIII, of AOB. pp. 35-39), and as violation of the due process clause of the 14th Amendment (AOB. Point XX, pp. 38-39); and the appellate court passed on this question (Appendix

opinion, pp. 9-10). This has been held ground of denial of due process of law:

Davidson v. New Orleans, 96 U. S. 97, 108;
Washington ex rel. O. R. & N. Co. v. Fairchild, 224 U. S. 510, 523 *et seq.*

(c) by taking for state highway public park lands of defendant City appellee not in conformity with the procedural requirements of section 1240 of the California Code of Civil Procedure as to eminent domain proceedings. This ground was assigned as error (AOB, Point I, pp. 15-16) and as in violation of the 14th Amendment (AOB, Point XX, pp. 38-39); and the District Court of Appeal passed upon it (Appendix opinion, p. 5). Failure to follow procedural requirements is denial of due process.

Marin County Water Co. v. Marin County, 145 Cal. 586.

(d) by exclusion of evidence of value of land taken. See subdivision 3 of Point II, *supra*. This ground was passed upon by the appellate Court (Appendix opinion, p. 19). It constitutes denial of due process.

Olson v. United States, 292 U. S. 246, 259.

(e) Compensation is also an element of due process.

Delaware, L. & W. R. Co. v. Town of Morristown, 276 U. S. 182, 190, 193.

See Point V, *supra*, for the manner in which this ground was raised and passed upon.

Denial of due process of law to appellant on these several grounds has bearing upon the other federal questions raised by appellant in that it has prevented due consideration of his rights as reversioner and a fair trial of the issues in this case.

VII.

Said Taking Constitutes Impairment of the Obligation of the Contract of Gift as Resting Upon Subsequent Legislation Prohibited by Section 10 of Article I of the Constitution of the United States.

City appellee admits that appellant has duly raised a federal question that "The enactment of section 103.5 of the Streets and Highways Code and the adoption by the State Highway Commission of a resolution authorizing the condemnation of Griffith Park lands for a state freeway impairs the obligation of a contract in violation of Article 1, section 10 of the United States Constitution." (Its Motion, p. 11.) And also that the District Court of Appeal passed upon the question (Its Motion, pp. 11-13). The cases cited by appellees are not in point here, because the record discloses that not only was the federal question presented to the highest court, but also it is necessarily involved in the decision. Appellant's Opening Brief is a part of the record because in California practice it presents the assignments of error (Appendix opinion, p. 3). As we have shown in points III and IV above, in this case and passim, the fact that the opinion of the District Court of Appeal has not specifically stated that the constitutional question involved is a federal question is immaterial.

As to the instant federal question of impairment of contract, the opinion of the District Court of Appeal (Appendix, pp. 16-17) evades and misstates the point of appellant's assignment of error. It is that the taking under the supposed authority of section 103.5 of the Streets and Highways Code authorizing the resolution of the State Highway Commission and Resolution No. 2859 and Ordinance No. 107485, all of which are state

statutes passed subsequent to the gift of the park land made inviolate by the City Charter (section 113) in force at the time of the grant and by the California Constitution (section 8 of Article XI) not repealable by any act of the state legislature, constitutes impairment of a contract prohibited by section 10 of Article I of the United States Constitution. (Jurisdictional Statement, par. III, pp. 5-6; par. 2, p. 7; par. (c), p. 9; p. 12; par. 3, pp. 14-15; pp. 15-16, as to statutes involved; and par. 2, p. 17).

The cases cited in the appellate court's opinion (Appendix, p. 17) and by appellees (state's Motion, p. 9) are distinguishable in fact and not applicable in principle to this case. They merely hold that the state cannot by contract divest itself of the power of eminent domain, nor does the United States Constitution take away from the states the power of eminent domain. That is not the issue here.

The authorities cited do not hold, and it is no. the law, that there is no limitation upon the power of eminent domain.

County of Marin v. Superior Court, 53 A. C. 638, 2 Cal. Rep. 758.

The issue here as to taking of the park land has two phases: first, as to the contract obligations of the City which is not the condemnor; and second, the constitutional and statutory limitations upon the State in the taking of park of the City of Los Angeles already appropriated to a public use.

Appellant contends that the consent of the City is essential and precedent to the right of the State to take the park land which was already appropriated to a public use inconsistent with use for a state freeway. And

the City's consent thereto is subject to the contract and the prohibition of the City Charter. In giving its consent and acquiescing to the taking of the park for the freeway in this case, the City appellee acted without authority, breached its trust and *impaired the contract* and caused a reversion to appellant. By upholding the validity of the City's unlawful act by ordinance and resolution (Appendix, pp. 7-8), a federal question is necessarily involved which has been duly raised by appellant.

On the other hand, the power of eminent domain is limited by the California Constitution (section 13 of Article XI) which prohibits delegation of power to a special commission (such as is the California Highway Commission) to take property of a municipality. As interpreted by the District Court of Appeal said section 103.5 is a valid delegation of power to the State Highway Commission to take City property. (Appendix, pp. 4-8). As we will next show, this involves not only the question of the delegation of legislative power to a state agency (*Griffith v. Department of Public Works*, 141 Cal. App. 2d 376), but also the question of the impairment of a contract which in this case is constitutionally inviolate.

The Charter of a city under the California Constitution (Section 8 of Article XI) cannot be repealed, altered or amended by any act of the state legislature without the consent of the municipal electorate as there prescribed. Section 113 of the City Charter is a part of the terms of the contract of gift of Griffith Park and forbids diversion of such a dedicated park from the purposes dedicated. By the terms of the grant any change of use immediately effects reversion. As we have shown, the act of taking these park lands by the Cali-

fornia Highway Commission and Department of Public Works is *ultra vires* and an impairment of said contract. The decision of the District Court of Appeal upholding the validity of the said legislative acts of appellees constitutes those acts impairment of the contract, and this is a federal question involved in the other federal question of right to compensation raised by appellant.

Conclusions.

The cases cited by City appellee's Moton on page 13 are entirely irrelevant to this appeal. For the federal questions raised here are neither frivolous, false, insufficiently raised, nor determinable on non-federal grounds, as in those cases, and they are either expressly or impliedly and necessarily involved in the questions passed upon by the decision of the California District Court of Appeal.

The issue now presented by the motions to dismiss is merely whether a federal question is presented. Therefore, we have not attempted to argue fully the merits of the case. We think we have proved that the federal questions have been sufficiently raised by appellant and passed upon by the state court, and that the motions to dismiss should be denied.

Respectfully submitted,

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